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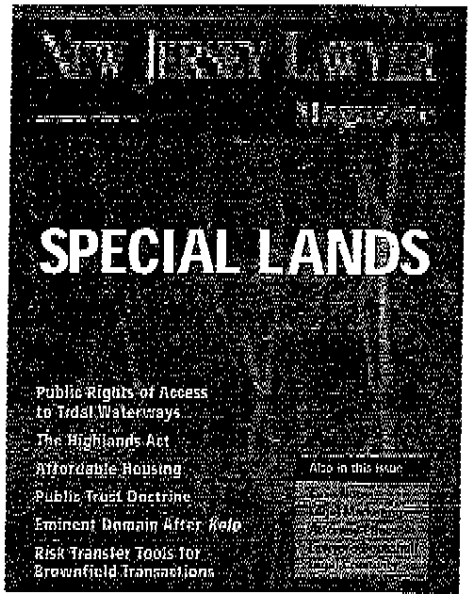

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Top 10 Tips on Handling Tidelands Applications

by William E. Andersen

Attorneys representing property owners or purchasers of lands subject to New Jersey tidelands claims of title have a number of important considerations to bear in mind. The state agency involved, the Tidelands Resource Council (TRC),[1] has procedures and practices unique to its role and its history. Counsel must be guided by the statutes,[2] the case law and what published information[3] exists. In addition, applicants will find the staff of the Bureau of Tidelands Management helpful in explaining how matters are prepared for council review and presented.

At the same time, clients will often press for immediate action because of pending real estate transactions. They will have heard that the TRC and its reviewing authorities have no deadline by which to act, and that the TRC need not make any conveyance at all if it feels keeping the land in state hands or subject to a claim is in the public interest.[4]

Overlaying all of this in recent years has been an unrelenting and dramatic rise in property values in many New Jersey areas, especially those offering waterfront access or views.

Experienced attorneys in this field have learned that it is usually possible to overcome these problems and secure an acceptable result without fatally damaging any pending transactions. This article will offer ideas to help accomplish this result.

First, some background is required. The state of New Jersey owns, in fee, all lands naturally flowed by the mean high tide within its borders, such as the lands under the Atlantic Ocean, Barnegat Bay and much of the Delaware River.[5] It also owns those lands once under tidal waters and since artificially filled.[6] The current tidal lands are presumptively state-owned, while the now-filled lands are presumptively privately owned, but are still burdened with the state's claim.[7] Adverse possession is not a defense to such claims of title.[8]

Some of these claims exist in every county except Morris, Sussex, Hunterdon, Warren and Somerset.[9] Hundreds of properties in the rest of the counties have these claims. Buyers usually want clear title, and these claims often become an issue on the sale of the affected land.

Generally, the claims are shown on tidelands claims maps of record in every county affected.[10] Once a claim has been identified, the state agency that must be contacted to clear title is the TRC, through its staff at the Bureau of Tidelands Management in Trenton. Usually, the state will agree to sell its interest if the lands involved have been filled since before 1977. Often the price is significant, since the state is constitutionally required to sell at no less than fair market value.[11] Depending on the facts, however, counsel can seek discounts on behalf of *bona fide* purchasers for value who are uninsured, or for the state's litigation risk associated with making the claim.[12] Additionally, thousands more waterfront properties in the affected counties adjoin natural tidelands and owners there must purchase or rent the areas they use for piers and the like.[13] Again, they must deal with the TRC.

Following is a list of the top 10 tips on handling tidelands applications. While reasonable minds could differ on their order of importance, experience has shown these points to be helpful and important.

10. Use the maps as the start of your research, not the end. Do not use paper prints to make decisions in close calls in tidelands matters.

The process usually starts with the announcement that a

state tidelands claim has been found on a property. The first thing to do is to question that conclusion. Ask how it was determined that there is a claim. Was a survey used? Was the survey compared with the original state plastic claims overlay and photo base maps, or with paper prints? Paper prints are far too inaccurate to use in such matters, as are tax maps.

Further, has your engineer or surveyor taken into account the recent redefinition of the state plane coordinate system? Have your engineer plot the claim using stable maps or geographic information systems (GIS) coordinates.

Also, ask about the source of the state's claim. If it appears that the claims line follows the high water line depicted on the photo base maps, then it is likely that the source of the claim on your property is the present scene. If your shoreline is natural, and has not been artificially filled, then you may be able to convince the TRC that the new upland created since the claims maps were filed was created by natural accretion. Most importantly, ask if a title search reveals any state tidelands grants. They, too, should be plotted on your survey. Thus, there are a number of ways in which, even if there apparently is a state title claim to the property, one might not legally exist.

9. When you first have contact with the client, get as much information as possible concerning the state tidelands claims.

You will often be pressed to resolve tidelands matters quickly because of rapidly rising real estate prices. The TRC does not set the value of its claim until presented with an application at a meeting, and so there is an advantage in filing state tidelands applications immediately and completing them as soon as possible. Having your clients sign the forms and fill out the questionnaires early will help move the process along, but it will keep the onus on you to follow through and actually file them with the state promptly. Unfortunately there are too many instances of delays in filing and completing applications, which hurt the clients and their insurers in this market.

Key to the tidelands application process is locating and understanding the title insurance policies that may be applicable. The focus in this area is often on the exceptions to coverage, which are usually found in Schedule B. A common exception is to "lands now or formerly flowed by the mean high tide." Usually, this exception exonerates the title insurance company from covering the claim. However, if the state is making a tidelands claim of title to all of the property covered by the title insurance policy, then title companies will sometimes honor the policy regardless of the exceptions, on the theory that otherwise there would have been no insurance at all. Alternatively, if the state tidelands claim is to a former tributary of the adjacent waterway, and the exception is to lands now or formerly flowed by Barnegat Bay, or the like, then there should still be coverage. The state claim is not to the bed of Barnegat Bay, but to a former tributary.

Title insurance policies, like all insurance policies in New Jersey, are read in favor of the insured's reasonable expectations, and in favor of coverage.[14] The named insured includes successors by operation of law, so that heirs and devisees are included, but purchasers for value are not. Intra-family transfers should therefore be protected with a new policy. However, one case allowed a revival of coverage following a reconveyance.[15]

Once you determine that there is coverage, the amount of that coverage becomes important. On occasion, title companies have compared the possible consideration expected to be charged by the state to the policy amount, and decided to surrender the policy amount to the insured. Relying on language now found in many policies, the title insurance company may then refuse to cover future costs of defense against the state tidelands title claim.[16] Such costs, involving surveys and appraisals and special expertise in a number of fields, can be considerable. Attorneys representing insureds may wish to resist refusals to cover defense costs in this way.[17]

Secure not only a current, sealed survey, but also any older surveys predecessors may have prepared, or which might be referenced in the title search. The state will lay claim to any ungranted filled area beyond record title, even if it is an encroachment of as little as 18 inches, the most common depth used for new bulkheads.

As long as the waterway is natural, the title claim will exist, regardless of the location of the apparent claim on the tidelands claims map. And if the property is within a state tidelands grant, but that area is subject to a piers-only clause, the encroachment of a new bulkhead will still represent a claim area. If record title reveals a filed map, and a conveyance from the developer of the property by reference to a filed map, the state may well claim title outshore of that filed map high water line, as it may do under the reservation statement, even if the filed map is over 40 years old.[18] Examine the history of the site from maps and surveys and aerial photography of the area to determine if a case can be made for accretion from that line to the current high water line.

If questioning the parties or reviewing the title record reveals a recent bulkheading, attempt to locate copies of whatever permits were secured at the time. The Department of Environmental Protection requires permits to be recorded,[19] and having the permits

avoids a time-consuming, and at times unsuccessful, search of state records.

Once secured, check the permits and the accompanying surveys against the current survey and the structures as built. Permits only protect structures in the same place and size as what was permitted. If the comparison reveals a change, then a permit modification, at least, will be required, and the TRC will require a corrected license, and, likely, what amounts to back rent.[20]

8. Have your surveyor plot everything.

Done right, a picture—here, the survey—is still worth a thousand words, especially for waterfront property. Have the mean high water line, the state's tidelands grants, its licenses, its leases and the claims line plotted on your survey. Are there structures in the water adjoining the property? If so, have them depicted as well. Do they match the permits and the tidelands license? Does the title search reveal a filed map high water line? If so, that should be shown as well.

Once your survey is completed accurately, check whether there are any gores between the claims line and the grant high water lines. Determine whether there are any encroachments or discrepancies with permits or licenses. Only then will you have a complete picture of the state's tidelands claim on the property.

7. Read the title search yourself.

A close examination of the title search for your property could pay real dividends in tidelands matters. A dynamic natural shoreline may reveal itself in a succession of conveyances showing ever-lengthening distances to high water, and thus possible accretion, which inures title to the upland owner.[21] Further, it may include a warranty deed, which may allow counsel to look to another title insurance policy for coverage.[22] If there is a state tidelands grant in the chain of title, determine whether the precise grantee was the record title owner of the subject property on the date of delivery: Only thus will the grant be valid, according to its terms.[23]

Moreover, the state tidelands grants in the chain of title, like any other deeds, may have other conditions that remain binding on present and future owners. Typical in such documents is the existence of a bulkhead line, and a prohibition against filling outshore of that line.[24] Regardless of where the claims line is, the state will assert title to any encroachment of bulkhead lines or no-fill clauses in grants or leases. What was noted earlier about filed maps applies here as well. If an owner took title by a filed map, then successors in title could take no more. Encroachments by fill beyond a filed map high water line will generate a title claim by the state in natural tidal water bodies. Be prepared to make a case for accretion or to apply to purchase the filled land from the state.

6. Don't take chances: Apply for a statement of no interest.

At times, state tidelands claims lines and state grant high water lines do not match. They often arise from different sources and are dated at different times, so the variances are not surprising. Still, if the grant high water line is waterward of the state claims line, a gore area exists that may represent a state tidelands claim.

Another common situation involves a streambed depicted in a grant as located differently than as shown on the state tidelands claims map. You may be of the opinion that the gore area constitutes no claim and that the intent of the parties was to include the claimed streambed wherever it may have been. Often, a review of the records of the TRC since the 1980s will reveal properties in the area with similar problems the state has already considered.

There is little reason to accept the risk of relying upon an opinion letter or an expert's advice. Under N.J.S.A. 13:1B-13.5(a), the TRC, for a nominal fee, will consider the results of your research, combine it with its own staff work, and decide whether there is a claim or not. If a statement of no interest is approved, the owner will receive a recordable document that will bind the state against making any future tidelands title claims on the property. This will be done without any reference to the value of the tract under review.[25]

5. Read escrow agreements carefully.

More and more in recent years, tidelands escrow agreements have been developed to deal with state tidelands claims matters without delaying closings. The TRC and the state are very supportive of this effort because the reviews required of TRC actions usually prevent the state from meeting closing deadlines. However, these escrow documents are commonly drafted by the buyer and presented to the seller as standard, and are at times signed without due thought. The standard escrow agreement often requires the seller or the seller's insurer to pay for the grant no matter what the price or the conditions. Often the processing of the grant is left in the hands of the buyer or buyer's attorney or agent, so the seller has little control over the filing of the application or the responsiveness of the buyer to the state or the timing of the state action.

In a rapidly rising real estate market, the TRC has seen escrows thought to be well in excess of what was needed stretched thin to cover the costs involved. Sometimes, even well-funded escrows are not enough. The seller has already sold, so he or she has not participated in the gains in the value of the property since the closing, and yet must pay that additional value up to the date of the action of the TRC at its meeting. This has led to what sellers have concluded are unfair and unex-

pected allocations of the costs between buyer and seller required by the *standard* escrow agreements.

When tidelands escrow agreements favoring buyers are signed, attorneys representing sellers should consider retaining at least the power and duty to process the tidelands applications and seeing them through. When their clients' money is at risk, representation would be at least some protection against potentially ruinous expenses.

4. Timing is everything.

If your client needs a state tidelands grant, lease, license or statement of no interest to regularize the title, there is no benefit to waiting to file the application. Payment is not required upfront; indeed, payment is almost certainly many months away. The application does not indicate acquiescence in the validity or value of the state's title claim, and a property owner may decline the grant up to the point of delivery without penalty. The process involves an exchange of information akin to exploring the possible settlement of a quiet title action.

On the other hand, waiting to file the application usually only increases the costs to settle the matter, especially in a rising real estate market. The process is lengthy. It involves review by the technical and appraisal staff of the Bureau of Tidelands Management, by the Tidelands Resource Council, by the commissioner of the Department of Environmental Protection, by the attorney general, by governor's counsel, by the governor, and by the secretary of state. It usually takes 12 to 18 months or more for even routine matters. If the applicant does not delay the process, as a matter of policy, the price is not changed after the TRC meeting, even though another year or more passes before delivery. The parties both assume that the value at the time the TRC acts remains the fair market value until the date of delivery.

During this process, it is important to retain control of the application if your client's money is at risk. Any delay by the applicant can result in the property being reappraised and the proposed consideration increased. If you have control over the process, you can prevent delays from occurring.

3. Selling the property while a tidelands application is pending is possible, but the transaction must be done with care.

Since the 1850s, the Legislature has recognized a "natural equity" that tidal waterfront owners have,[26] and New Jersey statutory law has protected that equity. The state may only deal with upland owners in tidelands title matters.[27] It may deal with others only with the upland owner's consent.[28] At the same time, the TRC is not a court, and may not determine who is an upland owner in any final way.[29] As a result, the TRC makes preliminary decisions and then makes grants, licenses and leases subject to the accuracy of those decisions.[30] In the few instances where the state has been wrong concerning upland ownership, the court voids the supposed grant.[31]

Part of this protection involves language appearing in nearly all state tidelands grants requiring that the grantee be the upland owner on the date of delivery of the grant. This paragraph is known as the upland owner's clause. It states, generally, that if the grantee is not the owner of the property on the date of delivery, then the grant is void *ab initio*.[32] To avoid problems with the statutory requirement of upland ownership, but to still process applications, the state requires applicants to certify to their upland ownership first at the time of the initial application; second, in response to the TRC's action; and then again just before delivery of the grant. Still, at times, referred counsel are not aware of title changes, and occasionally certify in error. This creates serious problems.

As a result, attorneys sometimes advise clients that they cannot convey title while their tidelands application is pending. To avoid this hardship, the TRC and its staff have developed a number of solutions. Property owners who have applied for state tidelands grants may sell before delivery if they inform the TRC, have the buyers assume the application, and advise the TRC of the disposition of any escrow. It is now routine for an application to be presented to the council in the names of the seller and a buyer, and almost as routine for a name change to be made in state tidelands grants as they are being processed. To avoid misunderstandings in this important matter, consider advising your clients in writing that they may transfer title while their application is pending, but only after informing you and the state of the conveyance. The alternative is to face the prospect of an invalid grant with limited ways of correcting the problem.

2. Read the tidelands instruments personally.

State tidelands grants, leases and licenses are read in favor of the state and against the conveyance of any interest, should there be any ambiguity.[33] With that in mind, it is important to read with care any tidelands instruments upon which there will be any reliance. Search the documents for any special conditions. Include in that search the information contained on the maps annexed to nearly all state tidelands grants.

At times, special language is added to the text of grants to take into account the state's public trust responsibilities. Public access clauses, as for public waterfront walkways or for beach access, are now imposed on appropriate properties.[34] Such condi-

tions are intended to be permanent. Similarly, there are often clauses preventing further filling of tidelands or establishing, in older grants, bulkhead lines and pierhead lines. Such clauses should be discovered, understood and their boundaries located on the current survey.

If there is any encroachment, the state will make a claim. Similarly, if public access is blocked, the property owner should count on the state's enforcement staff taking action.[35] Other states may measure their tidelands title interests in acres, but New Jersey does so in square feet. Encroachments or other violations of the terms of a grant or lease must be resolved.

1. Never pull an application from the agenda of the TRC.

This caution qualifies as the top tip on dealing with tidelands matters because of the financial harm such actions repeatedly cause applicants for no apparent gain. Applicants at times believe that it takes too long for a tidelands grant application to reach the TRC. Occasionally, when the date is set, the applicant objects to some aspect of the staff recommendation: the size of the claim is too large, the proposed discount is too low, or the appraised value of the site is too high, for example. The first inclination is to adjourn the application to a later date while the contested issues are discussed. There are too many examples when this results in a long delay, caused by the applicants, their attorneys, or their experts, in returning the matter to the TRC for a decision.

Often such delays, in a rising real estate market, trigger reappraisals of the property. At times, these re-evaluations more than offset any additional discount the attorney is seeking. At some point, counsel might emerge victorious, but the client or the insurer will still pay more. Trust them to be unimpressed with the success.

The perfect storm of such matters, for example, is triggered when a waterfront property's application is pulled from the council's agenda by the attorney who disagrees with the bureau's staff over the price. Then, the same attorney delays reporting back to the state, prices rise and the bureau locates further evidence on the claim and reappraises the site. The offer of a litigation risk discount is withdrawn, and instead of the lower result counsel first sought, the proposed grant consideration ends up being more than four times higher than it originally was.

There is no reason to expose the client or the insurer to this risk. Keep in touch with the Bureau of Tidelands staff so the client knows the staff recommendation and its basis before the meeting. Then, if there is a disagreement over some aspect of the matter, bring it to the staff's attention by phone or letter, and reserve the issue at the meeting if necessary. Allow the matter to go to a vote; that way the price and the conditions are fixed and the application will continue to be processed. Meanwhile, seek to resolve the outstanding issues.

If resolution is not possible, then represent the matter to the TRC on a motion for reconsideration. The TRC reconsiders such matters *de novo*, both in fact and in spirit, so that applicants are not prejudiced by the first determination. Nor is the staff recommendation given any special weight. If the result is favorable to the applicant, then the processing continues at the new value or with the new conditions, and no time is lost. If the TRC decision is to stand on the previously approved value or conditions, again no time is lost and there is no re-appraisal of the site.

Should the result still be considered unacceptable, refuse the grant and file suit to quiet title, or the client may continue to hold the property with the claim. The exposure to the clients and their attorneys seeking to pull an application from the Tidelands Resource Council's agenda is practically unlimited, while the risk in allowing the matter to proceed to a vote when it is ready, and then submitting it on reconsideration, if necessary, is negligible. That is a far better course to take in a rising market.

Final Thoughts

The Tidelands Resource Council and its predecessors have been in operation since 1864, and tidelands title claims in general have existed in New Jersey since 1821.[36] Thousands of grants and licenses and leases have been delivered since that time. In recent years, the development of the tidal areas of the state has proceeded at such a pace that many shore areas are fully built-out, and new development at times starts with bulldozing what has already been built. In such conditions, a premium is placed on resolution of title matters with speed.

The practice before the TRC is not so bad, and the process does not take as long as once believed. The proper use of escrows and joint applications solve most of the timing problems. And the cost of claims can be reduced for litigation risk without the expense of a lawsuit. Further, the state will discount its claim when the record title owner has acted in good faith.

When you are aware of the practice before the Tidelands Resource Council, you will prepare your applications better, present your positions more effectively and will more often be satisfied with the results you have achieved.

Endnotes

1. N.J.S.A. 13:1B-10.
2. N.J.S.A. 12:3- 1 to -71; N.J.S.A. 13:1B-13 to -13.14. As to regulations, *see* N.J.S.A. 12:3-12.3 (Supp. 1998).
3. Andersen, "Resolving State Title Claims to Tidelands: Practice and Procedure," 168 *NJL Magazine* 8 (Apr. 1995), 168-APR N.J. Law 8

(Westlaw). The Bureau of Tidelands' website has all the necessary forms and answers frequently asked questions. http://www.state.nj.us/dep/landuse/tideland.html. An insurer's viewpoint is Fineberg *Handbook of New Jersey Title Practice* Chapter 115 "Waters and Water Rights" (3d. Ed. 2003).

4. *Le Compte v. State*, 65 N.J. 447, 451 (1974).
5. *Bailey v. Driscoll*, 19 N.J. 363, 367-368 (1955).
6. N.J.S.A. 12:3-4.
7. *O'Neill v. State Highway Dept.*, 50 N.J. 307, 326-327 (1967).
8. N.J.S.A. 12:3-4.
9. In Somerset County, the only claim is in the northeast corner of Franklin Township.
10. N.J.S.A. 13:1B-13.4.
11. N.J.S.A. 12:3-12.1 (Supp. 1998).
12. New Jersey Attorney General Formal Opinion No. 3 of 1983, 1983 N.J. AG Lexis 5 (March 14, 1983).
13. N.J.S.A. 12:3-10.
14. *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 347 (1993).
15. *Sandler v. New Jersey Realty Title Ins. Co.*, 36 N.J. 471 (1962).
16. The option to pay the policy and defense costs to date is covered by the A.L.T.A. Owners Policy of 1992 in the Conditions and Stipulations Section 6(a), as well as other versions of the A.L.T.A. policy.
17. *Costagliola v. Lawyers Title Ins.*, 234 N.J. Super. 400 (Ch. Div. 1988).
18. *City of Jersey City v. Tidelands Resource Council*, 95 N.J. 100, 103 (1983).
19. *Island Venture Assocs. v. New Jersey DEP*, 179 N.J. 485 (2004).
20. *LeCompte v. State, supra.*
21. *Borough of Wildwood Crest v. Masciarella*, 51 N.J. 352, 357 (1968).
22. *Camden Cty. Welfare Bd. v. Fed. Dep. Ins. Corp.*, 1 N.J. Super. 532 (Ch. 1948).
23. *Fitzgerald v. Faunce*, 46 N.J.L. 536, 594 (E. & A. 1884).
24. N.J.S.A. 12:3-13 (Supp. 1980).
25. A typical statement of no interest may be found at Fineberg, *supra*, at 115-29.
26. *Keyport and Middletown Point Steamboat Co. v. Farmers Transportation Co.*, 18 N.J. Eq. 511, 516 (E. & A. 1866).
27. N.J.S.A. 12:3-10.
28. N.J.S.A. 12:3-9; N.J.S.A. 12:3-23.
29. *Brown v. Morris Canal and Banking Co.*, 27 N.J.L. 648, 653-54 (E. & A. 1858).
30. *In re Tideland's* License 96-0114, 326 N.J. Super. 209 (App. Div. 1999).
31. *Shamberg v. Board of Riparian Commissioners*, 72 N.J.L. 132 (Sup. Ct. 1905).
32. A form of a typical grant may be found in Fineberg, *supra* at 115-21.
33. *Martin v. Waddell's Lessee*, 41 U.S. 367, 411 (1842); *City of Passaic v. State*, 33 N.J. Super. 37, 40 (App. Div. 1954).
34. *National Assn. of Home Builders v. State*, 64 F. Supp. 2d 354 (D.N.J. 1999).
35. *Raleigh Avenue Beach Assn. v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).
36. N.J.S.A. 12:3-1; *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821).

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